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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 170.

FINANCE AND GUARANTY COMPANY,
PETITIONER,

vs.

HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT.

BRIEF FOR PETITIONER.

The opinion of the court below and the judgment to which this writ was granted is styled Oppenhimer, Trustee, *vs.* Finance and Guaranty Company, 5 Fed. (2d), p. 486, and 15 Fed. (2d), p. 1011.

Grounds of Jurisdiction.

The Circuit Court of Appeals for the Fourth Circuit, by its judgments rendered herein on the 5th day

of May, 1925 (R., 16-20), and November 1, 1926 (R., 51-52), respectively, held:

1. That under Section 5224 of the Code of Virginia, called the "Traders' Act," which is hereinafter set forth, that the rights of a trustee in bankruptcy, as a lienor under Section 47-A of the Bankrupt Act as amended by the Act of 1910, related back to a time anterior to the filing of the bankruptcy petition—that is, that under said "Traders' Act" property claimed to be subject to the provisions of the said "Traders' Act" remained subject to its provisions, even though its status was changed by the recapture thereof by the true owner thereof when it was subject to no lien and prior to the intervention of bankruptcy proceedings.

By such ruling the Circuit Court of Appeals for the Fourth Circuit failed to follow the ruling of the Supreme Court of the United States in Bailey *vs.* Baker Ice Machine Co., 239 U. S., 268, 276, which lays down the rule that the rights of a trustee in bankruptcy, as a lienor under the amendment of 1910 of the Bankrupt Act, attaches as of the time of the filing of the petition in bankruptcy.

It, therefore, follows that the construction by the Circuit Court of Appeals for the Fourth Circuit of Section 47-A of the Bankrupt Act is directly opposed to the construction of said Section 47-A by this Honorable Court and in conflict with the uniform construction of said Section 47-A of the Bankrupt Act, following the decision of this Court in Bailey *vs.* Baker Ice Machine Co., *supra*, of the several other circuits in the United States.

2. Notwithstanding the construction of the "Traders' Act," aforesaid, by the Supreme Court of Appeals of Virginia, that being the highest court in the State of Virginia, that said act enured to the benefit of "lien creditors" only (Capitol Motor Co. *vs.* Lasker, 138 Va., 630), the said Circuit Court of Appeals for the Fourth Circuit held that under the said "Traders' Act" the trustee in bankruptcy was entitled to recover the property which is the subject of this litigation, though, at the time of the filing of the petition in bankruptcy, said property had been recaptured by the true owner and was not subject to any lien by execution or other legal process.

The Circuit Court of Appeals for the Fourth Circuit, having refused to adopt the construction of the Virginia "Traders' Act" by the Supreme Court of Appeals of Virginia, that being the highest court in said State, the Federal Court, sitting in Virginia, has failed to enforce the law of Virginia as applied to the rights of your petitioner.

By reason of said construction of Section 47-A of the Bankrupt Act by said Circuit Court of Appeals for the Fourth Circuit and the failure of said circuit court of appeals to follow the construction of the Virginia "Traders' Act" by the Supreme Court of Appeals of Virginia, as aforesaid, it is proper that this Honorable Court should review said judgment of the Circuit Court of Appeals for the Fourth Circuit pursuant to Act of February 13, 1925, C. 229, Secs. 1, 13; 43 Stat., 936, 941; Title 11, Sec. 48, U. S. C. A. See Forsyth *vs.* Hammond, 166 U. S., 506, 514; Am. Const. R. Co. *vs.* Jacksonville, etc., Ry. Co., 148 U. S., 384.

Statement.

This action was brought in the District Court of the United States for the Eastern District of Virginia, at Richmond, Virginia, by the respondent, Henry W. Oppenheimer, trustee in bankruptcy for W. A. Lee, trading as National Motor Company, bankrupt, against the petitioner, Finance and Guaranty Company, for the recovery of four certain automobiles, of which the petitioner has repossessed itself under the terms of certain conditional sales contracts by the institution of an action at law in the State court on the 19th day of January, 1922, on the ground that such repossession of said automobiles by the petitioner constituted a voidable preference as against said trustee in bankruptcy because such automobiles, under the provisions of Section 5224 of the Code of Virginia, known as the "Traders' Act," were made liable for the debts of the bankrupt (R., 1-4).

Upon a trial had in the district court, a jury having been waived under proper stipulations of counsel, the district court held that the trustee in bankruptcy was not entitled to recover under the said "Traders' Act" (R., 10), to which judgment of the district court a writ of error was sued out by the trustee in bankruptcy to the Circuit Court of Appeals for the Fourth Circuit, the said circuit court of appeals reversing the judgment of the district court and holding that the trustee in bankruptcy, by reason of the "Traders' Act," was entitled to recover of the petitioner the said automobiles (R., 17-20; see 3 Fed. (2d), p. 486). The said

circuit court of appeals then remanded the case to the district court for a new trial, and the district court (R., 21-22), on the 15th day of January, 1926, feeling itself bound by the opinion and judgment of the Circuit Court of Appeals for the Fourth Circuit, entered judgment against the petitioner for the sum of $4,120.39, with interest thereon from December 15, 1922, until paid (R., 22-23), being the value fixed by the court of the four automobiles which are the subject of this action, to which judgment of the court upon said second trial of this action the petitioner sued out a writ of error to the United States Circuit Court of Appeals for the Fourth Circuit, which said circuit court of appeals did, by its judgment entered on the 1st day of November, 1926, affirm the judgment of the district court and adhered to its former decision on the ground that it was bound by its former ruling, being the "law of the case" (R., pp. 51-52).

Facts.

On the 28th day of April, 1921 (R., 34), and on the 6th day of August, 1921 (R., 40), respectively, the petitioner contracted by conditional sales agreement to sell to the National Motor Company (W. A. Lee trading under this name) four certain Velie automobiles, described in said contract, which said contracts were duly docketed, in accordance with the statute in such case made and provided, on the 18th day of May, 1921, and on September 10, 1921, respectively, in the office of the clerk of the Chancery Court of the City

of Richmond, this docketing being in strict accordance with the statute in such case made and provided. The contracts in all other respects conform to the provisions of the statute, title to the automobiles, which are the subject thereof, being reserved in the petitioner until said automobiles were fully paid for, as provided by said contracts; nothing was paid upon the contract price of this property, and on the 10th day of January, 1922, in a suit instituted in the Court of Law and Equity of the City of Richmond for the recovery of these automobiles, an order of seizure was issued and the property seized and delivered to the possession of the petitioner (R., 37); that from the 26th day of December, 1921, until the 10th day of January, 1922, a period of 15 days, the place wherein the business of Lee, trading as the National Motor Company, was conducted was closed, and during said period he had ceased to conduct business (R., 24). On the 20th day of January, 1922, a petition in involuntary bankruptcy was filed against Lee (R., 24), and he was finally adjudicated a bankrupt upon an order of publication entered in said proceeding because no service of process could be had upon Lee. On March 22, 1922, Henry W. Oppenhimer was appointed trustee in bankruptcy of W. A. Lee (R., 24). On January 4, 1923, a year after the seizure of said automobiles and return thereof to the petitioner, said seizure being had pursuant to the conditional sales contracts reserving title in the petitioner, this action was instituted by the trustee in bankruptcy against this petitioner to recover possession of said automobiles. The title to this

property was at all times in the defendant, and no property in said automobiles was ever acquired by the bankrupt. The conditional-sales contracts prohibited either the sale or use of these automobiles by Lee; the petitioner was constantly vigilant that the terms of the contract should be complied with. From the very day of the delivery of these automobiles to the possession of Lee, under said conditional-sales contracts, the petitioner was constantly alert to see that they did not leave Lee's possession, having time and again visited Lee's storeroom for the purpose of "checking" these cars.

Errors Assigned Intended to be Urged.

The United States Circuit Court of Appeals for the Fourth Circuit erred:

1. In its refusal to follow the rule in Bailey *vs.* Baker Ice Machine Company, construing Section 47 (*a*) of the Bankrupt Act, as amended by the Act of 1910, so as to fix the rights of the trustee in bankruptcy as a lienor as of the date of the filing of the petition.

2. In that it failed to follow the construction by the Supreme Court of Appeals of Virginia of the so called "Traders' Act," Section 5224 of the Code of Virginia, that court being the highest court of the State of Virginia, which construction is clear that said act has no application to property recaptured from the possession of the trader and is for the protection of lien creditors only.

3. That the judgment of the Circuit Court of Appeals for the Fourth Circuit, fixing the rights of the trustee in bankruptcy as a lienor at a time anterior to the filing of the petition, is a departure from the rule of decision of this Honorable Court in Bailey vs. Baker Ice Machine Company, 239 U. S., 268, which rule of decision is followed by the other circuits of the United States and, therefore, creates a conflict of decision in the several circuits of the United States.

ARGUMENT.

The Circuit Court of Appeals for the Fourth Circuit, by its judgment, holds that the rights of the trustee "depend upon the so-called 'Traders' Act' of Virginia—Section 5224 of the Code of Virginia," which is as follows:

> "If factor, agent, etc., who is a trader, fail to disclose name of principal or partner, or do business in his own name, property used in such business liable for his debts; exception. If any person transact business as a trader with the addition of the words 'factor,' 'agent' and 'company,' or 'and Co.,' and fail to disclose the name of its principal or partner by a sign in letters easy to be read placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the City, town or county wherein the same is transacted; or if any person transact such business in his own name, without any such addition; all the property, stock and choses in action acquired or used in such business shall, as the creditors of any such

> person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

and construes said "Traders' Act" so as to make liable for the debts of "general creditors" the property which had been in the possession of the bankrupt as a part of his ordinary stock in trade within four months prior to the filing of a petition in bankruptcy, even though the bankrupt never had actual title to said property and such property had been recaptured and taken into possession by the true owner thereof prior to filing of a bankruptcy petition and the existence of any lien creditor.

The Supreme Court of Appeals of Virginia, in Capitol Motor Company vs. Lasker, 138 Va., p. 630, reaffirming a long line of decisions, held:

a. That under the Virginia law a trustee under a deed of assignment, upon the recordation of the deed, becomes a lienor.

b. That the word "creditors" as employed in the Virginia Traders' Act (Virginia Code, Section 5224) means "lien creditors."

c. That property in the possession of a trader, as a part of his general stock of merchandise, while so possessed, is subject to the provisions of the "Traders' Act," but when repossessed by the true owner thereof, before any lien has attached thereto, such property is no longer subject to the provisions of said "Traders' Act."

That such is the true construction of said Section 5224 of the Code of Virginia—"Traders' Act"—is amply supported by the language of the Supreme Court of Appeals of Virginia in the case of Capitol Motor Company *vs.* Lasker, *supra*, cited by the Circuit Court of Appeals for the Fourth Circuit, in support of its ruling, to which language we most respectfully direct the attention of the court.

At page 637 of volume 138, Virginia Reports, it is said:

> "The main questions involved may be stated thus: (1) Were the eight automobiles or any of them, liable to the creditors of the defendant under Section 5224 of the Code, known as the Traders' Act; and (2) did White, the assignee, have the right to recover the eight automobiles, or any of them, for the benefit of the creditors of the defendant?
>
> "So much of Section 5224, Code of 1919, as is applicable, is as follows: 'If any person transact such business in his own name * * * all the property, stock and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such persons.'
>
> "It is earnestly contended by counsel for the defendant that in construing this statute the question of the true ownership of the property is not involved, that the only question for determination is whether the stock or property was acquired or used in such business. Citing Hoge *vs.* Turner, 98 Va., 624. That the lien which the plaintiff seeks to assert is a secret lien and is in fraud of the rights of the general creditors.

"Judge Riely, in delivering the opinion of the court in Hoge *vs.* Turner, *supra*, said: 'The purpose of the legislature in enacting the statute, as the title of the original act passed March 28, 1839, shows, was to prevent persons carrying on business under false or fictitious names and firms. To prevent fraud,' etc.

"Numerous cases have been cited dealing with this statute. Edmunds *vs.* Hoffie Piano Co., 97 Va., 588; Partlow *vs.* Lickliter, 100 Va., 63; Virginia Book Co., Inc., *vs.* Site, 254 Fed., 46; Boice *vs.* Finance and Guaranty Corporation, 127 Va., 563.

"In all of these cases the question presented was either a contest between the trader and creditors, between judgment creditors and lienor, or between an innocent purchaser for value and lienor or seller. The instant case is different. Here there is no contention that the dealer is trying to perpetrate a fraud on its creditors. On the contrary, the dealer, or to be more exact, its assignee, is extremely virtuous and is seeking to prevent one of its creditors from perpetrating a fraud upon all of its other creditors. If the act of the plaintiff is fraudulent, it was rendered so by the acquiescence of the defendant. We do not think the action of the plaintiff was in any respect fraudulent. It had a right to enter into the transaction, taking as it did the risk of having the automobiles subjected to the debts of defendant before it could enforce its trust lien. So as between plaintiff and defendant the recordation of the trust agreement was an immaterial matter. But as between plaintiff and the other creditors of defendant a different situation is presented.

"Until the institution of the action of detinue and the execution and recordation of the deed of assignment, we have no difficulty in holding that the eight automobiles constituted in part the apparent assets of the defendant dealer, and could be subjected to satisfy the claims of creditors, that is, lien creditors.

"(1) In answering question number one, we are of the opinion that a proper construction of the 'Traders' Act' (Sec. 5224) is that the act is applicable only to property, stocks, etc., used in the business of the trader, i. e., property, stocks, etc., which constitutes, in whole or in part, the apparent assets of the business of the trader, at the time in question; and that the creditors who are entitled to claim the benefit of such act are lien creditors only, or some representative of theirs, such as their trustee, and that whether the lien be obtained by deed of trust, execution, or otherwise, is immaterial.

"(2) In answering question number two, we are further of the opinion that White, trustee, was the proper one to intervene in the detinue action; that as trustee under the deed of assignment, he was the representative of the creditors of defendant, who immediately upon the recordation of the deed of assignment became lien creditors."

And again, at page 641:

"Upon applying the construction of the Traders' Act as stated, *supra*, to the instant case, we find the following to be the situation:

"On November 4, 1921, plaintiff by its action of detinue instituted, and its bond given that day, and the possession taken that day by the

sheriff under the bond, repossessed itself of six of the automobiles on that day; so that after November 4th, those six automobiles were no longer a part of the apparent assets of the business of the trader, the defendant. That is to say, after that date the Traders' Act was no longer applicable to those six automobiles.

"The deed of trust to White, trustee, executed on November 7th, could not and did not convey any rights under the Traders' Act to White, trustee, or to any creditors, as to the six automobiles. But as to the other two automobiles, plaintiff did not obtain possession of them until November 10, 1921. They, until that date, continued to be part of the apparent assets of said trader, the defendant. They, therefore, as property to which the Traders' Act was applicable, passed to the trustee, by virtue of the deed of trust executed on November 7, 1921, which gave to the creditors, secured in that deed, or the trustee as assignee for their benefit, the right to claim the benefit of the act as to the two automobiles and to recover the same."

The property, which is the subject of this litigation, was repossessed by the true owner on January 10, 1922, ten days prior to the filing of the bankruptcy petition.

Under the Virginia decisions, upon such repossession, it ceased to be subject to the provisions of the Traders' Act.

Ten days prior to the filing of the bankruptcy petition said property ceased to be any part of the apparent assets of the then trader and subsequent bankrupt.

Under the authority of Bailey vs. Baker Ice Machine Company, *supra*, the trustee in bankruptcy's status as a lienor became fixed ten days after the Virginia Traders' Act ceased to be applicable to the property of the petitioner.

It therefore follows that the rights of your petitioner were fixed on the 10th day of January, 1922, when it repossessed its property, and that the rights of the trustee in bankruptcy were fixed on the 20th day of January, 1922, when the petition was filed (R., 1-2).

We respectfully submit that the ruling of this Honorable Court in Bailey vs. Ice Machine Company, *supra*, is conclusive of the legal propositions here involved, and that the Circuit Court of Appeals for the Fourth Circuit, having failed to follow said ruling, that its decision and judgment is erroneous and if permitted to stand would work great injustice to your petitioner and all persons similarly situated.

It is most respectfully submitted that under a proper construction of the Virginia Traders' Act said act could have no application to the property repossessed by your petitioner ten days prior to the filing of the bankruptcy petition, and that the rights of the trustee in bankruptcy as a lienor, being fixed as of the time of the filing of the bankruptcy petition, that he had no claim upon or lien against said property, and that the Circuit Court of Appeals for the Fourth Circuit erred in so holding.

The rights of the trustee in bankruptcy being fixed by the provisions of 47 A of the Bankruptcy Act, as construed by this Honorable Court in Bailey vs. Baker, etc., *supra*, that the said Circuit Court of Appeals for

the Fourth Circuit were bound by such ruling and when applied to the facts of this case should have held that the property which is the subject of this litigation was not subject to any claim by the trustee.

That the repossession by your petitioner of its property ten days prior to the filing of the bankruptcy petition did not constitute a voidable preference as against the trustee in bankruptcy within the meaning of Section 60 B of the Bankrupt Act is clear under the authority of Bailey vs. Baker, etc., *supra*, in which this Court said:

> "The question next to be considered is whether the contract operated as a preferential transfer by Grant Brothers within the meaning of Section 60b of the Bankruptcy Act, as amended June 25, 1910, Chap. 412; 36 Stat. at L., 838, 842; Comp. Stat., 1913, Sections 9586, 9644, which declares that 'a transfer' by a bankrupt 'of any of his property' shall be voidable by the trustee, if it be made or recorded (when recording is required) within four months before the petition in bankruptcy is filed, and 'the bankrupt be insolvent and the * * * transfer then operate as a preference,' etc. The section leaves no doubt that to be within its terms the transfer must be one which a bankrupt makes of his own property and which operates to prefer one creditor over others; and if further light be needed there is a declaration in the Bankruptcy Act (Section 1, clause 23) that the word 'Transfer' shall be taken to include every mode 'of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift

or security" (30 Stat. at L., 545; Chap. 541, Comp. Stat., 1913, Section 9585). It, therefore, is plain that Section 60b refers to an act on the part of a bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate which the Bankruptcy Act seeks to apply for the benefit of all creditors. New York County Nat. Bank *vs.* Massey, 192 U. S., 138, 147; 48 L. Ed., 380, 384, 24 Sup. Ct. Rept. 199. Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs, but the Baker Company's. The ownership was not transferred, but only the possession, and it was transferred to the bankrupts, not from them. Being only conditional purchasers, they were not to become the owners until the condition was performed. No doubt the right to perform it and thereby to acquire the ownership was a property right. But this right was not surrendered or encumbered. On the contrary, it remained with the bankrupts and ultimately passed to the trustee, who was free to exercise it for the benefit of the creditors. So there was no diminution of the bankrupt's estate.

"Under the recording law of Kansas a contract of conditional sale is valid between the parties, whether filed for record or not, but is void as against a creditor of the vendee who fastens a lien upon the property by execution, attachment, or like legal process before the contract is filed for record. Gen. Stat., 1909, Sec. 5237; McVay *vs.* English, 30 Kans., 368, 371;

1 Pac. 795; American Lead Pencil Co. *vs.* Champion, 57 Kans., 352, 357; 46 Pac., 969; Youngberry *vs.* Walsh, 72 Kans., 200, 227; 83 Pac., 972; Geyser M. F. G. Co. *vs.* Murray, 84 Kan., 450, L. R. A.; 114 Pac., 1046; Paul *vs.* Lingenfelter, 6969 Kan., 871; 132 Pac., 1179; Geppelt *vs.* Middlewest Stone Co., 90 Kan., 539; 135 Pac., 1026; Big Four Implement Co. *vs.* Wright, 47 L. R. A. (N. S.), 1223; 125 C. C. A., 577; 207 Fed., 535. Here the contract was made October 14th, 1911, and filed for record May 15, 1912. In the meantime no creditor fastened a lien upon the property by execution, attachment, or other legal process. But it is contended that Section 47-A, clause 2, of the Bankruptcy Act, as amended in 1910, Chap. 412, 36 St. at L., 838; 80 Comp. Stat., 1913, sections 9586, 9631, gave the trustee the status of a creditor having such a lien. That section provides that a trustee in bankruptcy, 'as to all property in the custody or coming into the custody of the bankrupt court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings.' Although otherwise explicit, this provision does not designate the time as of which the trustee is to be regarded as having acquired the status indicated, and yet some point of time must be intended. Is it the date of the trustee's appointment, the filing of the petition in bankruptcy, or some time anterior to both? When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is in

itiated, that the hands of the bankrupt and of his creditors are stayed, and that his estate passes actually or potentially into the control of the bankruptcy court. We have said 'the filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as in *custodia legis* from the filing of the petition.' Acme Harvester Co. vs. Beeckman Lumber Co., 222 U. S., 300, 307; 56 L. Ed., 208, 213; 32 Sup. Ct. Rep., 96. And again: 'We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.' Everett vs. Judson, 228 U. S., 474, 479; 57 L. Ed., 927, 929; 46 L. R. A. (N. S.), 154, 33 Sup. Ct. Rept., 568. And see Zavelo vs. Reeves, 227 U. S., 625, 631; 57 L. Ed., 676, 678; 33 Sup. Ct. Rep., 365; Ann. Cas., 1914 D, 664. Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceeding, it seems reasonable to believe that some expression of that intention would have been embodied in Section 47 A, as amended. As this was not done, we think the better view, and one which accords with other provisions of this act, is that the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is

> filed. Here the petition was filed almost two months after the contract was filed for record, and therefore the trustee was not entitled to assail it under the recording law of the State."

In the case of Firestone Tire & Rubber Co. *et al. vs.* T. C. Cross, Trustee in Bankruptcy of the Capital City Garage & Tire Co., decided by the Circuit Court of Appeals for the Fourth Circuit on January 11, 1927, 17 Fed. (2d), 417, the court said:

> "In the light of the foregoing decisions, there can be no doubt whatever that, under the present state of the law in South Carolina, while a mortgage, conditional sales contract, or contract of bailment is void as against subsequent creditors of the mortgagor, vendee, or bailee, unless recorded pursuant to the statute, nevertheless, if it be recorded after the statutory period, it is then good against all creditors who have not in the meantime secured some lien upon the property. If therefore the contracts in this case had been recorded at any time prior to the filing of the petition in bankruptcy, there can be no doubt that they would have been good against general creditors and against the trustee in bankruptcy. It is true that the contracts were not recorded, but it is undisputed that six weeks before the petition in bankruptcy was filed, the property embraced in the contracts was repossessed by the owners and taken from the custody of the bailee. Can there be any question that this recaption of the property was as effective for preserving the rights of the owners as the mere recording of the contracts would have been? Recording would only have been con-

structive notice of defendants' claims. The reception was actual notice and more than actual notice of the claims of defendants, for it withdrew the property itself from the possession of the bailee. If it be said that it is a hardship on creditors who have extended credit on the faith of the bankrupt's possession that their claims should be defeated by this reception of the property by the owners, the answer is that their claims could undoubtedly be defeated by the mere recording of the contract at any time before they secure a lien on the property, and that the hardship is no greater in the one case than in the other. If the bailor can continue to leave the property in the possession of the bailee and protect his rights against prior unsecured creditors by merely placing the contract on record, he certainly should be able to protect them by terminating the contract, and taking the property back into his possession.

That the reception of property under statutes, interpreted as are the recording acts of South Carolina, is as efficacious to protect the rights of the owners as registration is, we think, supported not only by reason but also by authority. Remington on Bankruptcy (3rd Ed.), Vol. 4, Sec. 1570, states the rule applicable to such cases as follows: "If possession is taken by the mortgagee or conditional vendor before the bankruptcy petition is filed, such taking of possession operates as a filing and the lien will be good although bankruptcy follows within four months, unless the mortgage or conditional sale is void otherwise as a preference, or void as containing a power of sale."

The rule and the reason for it are well stated by the late Judge Woods, speaking for the

Court, in Industrial Finance Corporation *v.* Cappelmann (C. C. A. 4th), 284 F., 8, 11, as follows: "When a State recording statute, as construed by the State court, only provides for protection against unrecorded instruments of 'lien creditors' or 'creditors who have fastened a lien on the property,' or 'creditors armed with judicial process,' or the like, it has been held that the trustee cannot recover the property when the holder of an unrecorded mortgage or other instrument requiring record acquires possession before the filing of the petition in bankruptcy. This holding is on the express ground that the rights of no creditors had attached to any of the property until the petition was filed; that the trustee did not until then acquire the right of a lien creditor and therefore could not recover property which had *bona fide* passed from the possession and ownership of the bankrupt before the petition was filed." • • •

"Other cases supporting the position that taking possession will supply the place of registration are Duffy *v.* Charak, 236 U. S. 97, 35 S. Ct. 264, 59 L. Ed. 483; Woods *v.* Stemple (C. C. A. 4th), 289 F. 239; Hagan *v.* McNiel (C. C. A. 6th), 13 F. (2d) 852; *In Re* Thomas Electric Corporation (C. C. A. 7th), 283 F. 392; First State Bank of Crook, Colo., *v.* Fox (C. C. A. 8th), 10 F. (2d), 116.

"So far we have dealt with the taking of possession as though the contracts in question were mortgages under which possession had been taken by the mortgagee. As a matter of fact, however, in taking possession of the property in this case, defendants were not seizing it to hold as security for a debt, but as property which belonged to them absolutely and uncon-

ditionally, the title to which they had never parted with even conditionally. It had been placed in the hands of bankrupt as bailee but remained at all times the property of defendants. When the contracts were terminated and possession taken by defendants, in accordance with their terms, the contracts were completely executed and ended, and there was no right of redemption or other interest in the property, on the part of the bailee. To hold in such case that the rights of the owners were not protected by what was done, but that they would have been protected by merely placing the contracts on record while allowing the goods to remain in the possession of bankrupt, would be manifestly absurd.

"We have discussed the questions involved at considerable length, because the decision of this court in the case of Industrial Finance Corporation v. Cappelmann, 284 F. 8, is apparently in conflict with the decision here. That was a case involving the rights of the holder of an unrecorded chattel mortgage under the registration laws of South Carolina, but it was rendered before the Supreme Court of that State had decided the case of Carroll v. Cash Mills, *supra*, construing the amendment of 1914. An examination of the opinion in the Cappelmann Case will show that the court did not consider the effect on the registration statutes of the amendment of 1914, but based its decision on the assumption that it was still the law of South Carolina that 'the rights of subsequent simple contract creditors for value without notice against conveyances or liens not recorded as required by the statute accrue when the credit is ex-

tended, and cannot be defeated by any subsequent action of the holder of the secret conveyance or lien.' As shown above, this is the view which has been expressly repudiated by the Supreme Court of South Carolina, construing the amendment, which was apparently overlooked in the Cappleman Case. Of course, the construction put upon the statute by the courts of the State, in a case like the present, must control the Federal courts. Cutler v. Huston, 158 U. S., 423, 15 S. Ct. 868, 39 L. Ed. 1040.

"As the defendants took possession of the property in question prior to the filing of the petition in bankruptcy, we do not think, in the light of the interpretation placed upon the registration statutes of South Carolina by the Supreme Court of that State, that the trustee is entitled to recover either the property or its value. The trustee is vested by law merely with the title of the bankrupt as of the date he was adjudged a bankrupt. Bankruptcy Act, Sec. 70 (a), being Comp. St. Sec. 9654. He may avoid any transfer which any creditor might have avoided. Section 70 (e). And, as to property in the custody of the bankruptcy court, he is vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and, as to the property not in the custody of the court, is vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. Section 47 (a) as amended by Act of June 25, 1910 (Comp. St. Sec. 9631). The bankrupt had no title to the property in controversy when the petition in bankruptcy was filed, and, as shown above, it had not been transferred by a